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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 766.

SEPHUS WRIGHT AND THOMPSON WADE, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

FILED JULY 26, 1894.

(15650.)

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1 In the circuit court of the United States of America for the eastern district of Texas, in the fifth circuit.

Be it remembered, that at a regular term of the circuit court of the United States of America for the eastern district of Texas, in the fifth circuit, begun and held at the court rooms of said court in the city of Paris, in said district, on the first Monday, the same being the second day of April, A. D. 1894, present and presiding, the honorable David E. Bryant, United States district judge, and which term adjourned on the 14th day of July, A. D. 1894, the following cause came on for trial, to wit:

THE UNITED STATES OF AMERICA
v.
STEPHEN WRIGHT AND THOMAS WADE. } No. 557. Charge: Murder.

2 SATURDAY, *April 7th*, 1894.

Court met pursuant to adjournment.

Presiding Hon. D. E. Bryant, judge; R. E. Hannay, esq., U. S. attorney; Frank Lee, esq., asst. U. S. atty.; J. S. Williams, marshal, and C. Dart, clerk, by H. H. Kirkpatrick, deputy, all present.

This day came the grand jury and, a quorum being present, presented in open court the following bills of indictment, viz:

THE UNITED STATES
v.
STEPHEN WRIGHT AND THOMAS WADE. } 586. Charge: Murder.

Each of which bills of indictment the clerk is ordered to file and enter upon the proper dockets.

In the name and by the authority of the United States of America.—In the circuit court of the United States of America for the eastern district of Texas, in the fifth circuit.

3 At a stated term of the circuit court of the United States of America for the eastern district of Texas, in the fifth circuit, begun and held at Paris, Texas, within and for the district and circuit aforesaid, on the first Monday, the same being the second day of April, in the year of our Lord eighteen hundred and ninety-four, and continued by adjournment to and including the seventh day of April, in the year of our Lord eighteen hundred and ninety-four.

Eastern district of Texas, sct., the grand jurors of the United States of America, duly elected, impaneled, tried, sworn, and charged to inquire into and due presentment make of offenses against the laws of the United States of America, in and for the district and circuit aforesaid, on their oath in said court present: That one Stephen Wright and one Thomas Wade, late of Choctaw Nation, Atoka County, Indian Territory, in the district and circuit aforesaid, on the ninth day of January, in the year of our Lord eighteen hundred and ninety-four, in Atoka County, in the Choctaw Nation, in the Indian Territory, the same being annexed to and

constituting a part of the said fifth circuit, and annexed to and constituting a part of the eastern district of Texas, for judicial purposes, and being within the jurisdiction of this court, did unlawfully, fraudulently, and feloniously, and with their malice aforethought and with the malice aforethought of each of them, and with a certain deadly weapon, to-wit,
4 a certain gun, then and there held, make an assault in and upon the body of one Mike Peter with said gun held as aforesaid, said gun being then and there loaded and charged with gunpowder and leaden balls, then and there held and used as aforesaid, the said Stephen Wright and the said Thomas Wade did then and there shoot off and discharge the contents of said gun at, in, and upon the body of said Mike Peter, inflicting thereon a mortal wound, of which mortal wound the said Mike Peter did languish, and languishing did then and there instantly die.

And the same grand jurors aforesaid, upon their oaths aforesaid, do say that upon the day aforesaid, at the place aforesaid, with said deadly weapon aforesaid, used as aforesaid, and in the manner aforesaid, the said Stephen Wright and the said Thomas Wade did unlawfully, feloniously, and with their malice aforethought, kill and murder the said Mike Peter, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

Eastern district of Texas, sct., the grand jurors of the United States of America, duly elected, impaneled, tried, sworn, and charged to inquire into and due presentment make of offenses against the laws of the United States of America, in and for the district and circuit aforesaid, on their oaths in said court present: That one Stephen Wright and one Thomas Wade,
5 late of Atoka County, Choctaw Nation, Indian Territory, in the district and circuit aforesaid, on the ninth day of January, in the year of our Lord eighteen hundred and ninety-four, in Atoka County, in the Choctaw Nation, in the Indian Territory, the same being annexed to and constituting a part of the said fifth circuit, and annexed to and constituting a part of the eastern district of Texas, for judicial purposes, and being within the jurisdicition of this court, did unlawfully, fraudulently, and feloniously, and with their malice aforethought and with the malice aforethought of each of them, and with certain deadly weapons, to wit, a certain gun and a certain club and a certain blunt instrument to the grand jurors unknown, a more particular description of which said weapons the grand jurors are unable to give, make an assault in and upon the body of one Mike Peter with the said deadly weapons held as aforesaid; and the said Stephen Wright and the said Thomas Wade did then and there strike, beat, and bruise him, the said Mike Peter, with the said deadly weapons, and did as aforesaid and by the means aforesaid in and upon the body of the said Mike Peter inflict certain mortal wounds, of which said mortal wounds the said Mike Peter did then and there instantly die.

And he, the said Mike Peter, had theretofore, to wit, on or about the twenty-third day of December, in the year of our Lord eighteen hundred
6 and ninety-three, acted in the legal capacity of a posse and guard for and in behalf of a certain deputy United States marshal for eastern district of Texas, to wit, William Colbert, who was then and there lawfully empowered to employ and deputize him, the said Mike Peter, in said capacity of posse and guard. And the said Mike Peter had

theretofore at divers and sundry times acted in said capacity of posse and guard appointed and empowered to so act by certain deputy marshals in and for said district.

And by virtue of his said employment in the said capacity of posse and guard by the officers aforesaid, and by virtue of the laws of the said United States then and there valid and existing, he, the said Mike Peter, was then and there entitled to the protection of the laws of the said United States of America.

And the said grand jurors aforesaid, upon their oaths aforesaid, do say that upon the day aforesaid, at the place aforesaid, with said deadly weapon aforesaid, in the manner aforesaid, and used as aforesaid, the said Stephen Wright and the said Thomas Wade did unlawfully, feloniously, and with their malice aforethought, kill and murder the said Mike Peter, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

T. W. JOHNSON,
Foreman of the Grand Jury.
FRANK LEE,
Asst. U. S. Attorney, Eastern District of Texas.

(Endorsed:) No. 586. The United States *vs.* Stephen Wright,
7 Thomas Wade. Offense: Murder. A true bill. T. W. Johnson, foreman of the grand jury. U. S. witnesses: Kittie Wilson, Atoka, I. T.; Mike Philburn, Atoka, I. T.; Cornelius Osborn, Atoka, I. T.; J. B. Lee, McAlister, I. T.; Hattie Ward, Atoka, I. T.; Ely Edwards, Atoka, I. T.; Wm. Colbert, Atoka, I. T.; Thompson Peter. Returned and filed in open court 7th day of April, 1894. C. Dart, clerk, by H. H. Kirkpatrick, deputy. Section 5339. Acts June 9th, 1888, p. 178. Sup., p. 589.

(Further endorsed:) We, the jury, find the defendants, Cephas Wright and Thompson Wade, guilty of murder in the Indian country as charged in this indictment.

R. S. BRAME, *Foreman.*

MAY 31*st*, 1894.

In the cirt. court of the U. S. *States* for the eastern dist. of Texas, May term, 1894.

THE UNITED STATES
vs.
STEPHEN WRIGHT AND THOMAS WADE. } No. 586.

Now come the defendants in the above-entitled and numbered cause, and for plea herein say that this court should no further prosecute this suit
8 for the reason that this court has no jurisdiction over the person, life, or liberty of these defendants, and no jurisdiction to try and determine this cause, for the reason that said defendants are all by blood Chocta' Indians, living and residing in the Chocta' Nation, Indian Territory; and that said offense is said to have been committed in said Chocta' Nation, Indian Territory; and that the deceased, Mike Peter, at the time of the alleged killing, was a Chocta' Indian by blood, living and residing in said Chocta' Nation, Indian Territory. That deceased at the time of the alleged

killing is not alleged in the ind. to have been Indian agent or policeman appointed under the laws of the United States, 'or was he ever such officer, nor was he a United States deputy marshal, or had ever acted as such, nor a posse comitatus or guard killed while lawfully engaged in the execution of any of the United States processes; nor was the said Mike Peter, at the time of the alleged killing, lawfully engaged in any duty imposed upon him as agent, policeman, deputy marshal, posse comitatus, or guard, 'or was he ever at any time a United States officer, created by virtue of the laws of the United States, by reason of which this court could acquire jurisdiction over the defendants. Wherefore these defendants say this court has no jurisdiction to try and determine this cause.

J. J. BRENTS & J. W. FREDERICK,
Attys. for Defts.

9 (Endorsed:) The United States *vs.* Stephen Wright & Thomas Wade. Defts. plea to the jurisdiction of the court. Filed May 29, 1894. C. Dart, clerk, by H. H. Kirkpatrick, deputy.

In the dist. court of the United States for the eastern dist. of Texas.

THE UNITED STATES
vs.
STEPHEN WRIGHT & THOMAS WADE, } No. 586.

Now come the defendants, Stephen Wright and Thomas Wade, and except to the sufficiency of the indictment filed herein—

1st. Because said indictments fail to allege that Mike Peters, the deceased, was acting as posse or guard at the time of the alleged killing or an officer of the United States Government.

2nd. Because said indictments fail to allege that the offense for which these defendants stand charged was committed within the sole and exclusive jurisdiction of this court.

Wherefore defendants ask that said indictment be quashed and defendants discharged.

J. J. BRENTS & J. W. FREDERICK,
Defts. Attys.

10 (Endorsed:) The United States vs. Stephen Wright & Thomas Wade. Motion to quash ind. Filed May 30, 1894. C. Dart, clerk, by H. H. Kirkpatrick, deputy.

WEDNESDAY, *May* 30, 1894.

Court met pursuant to adjournment.

Present and presiding, Hon. D. E. Bryant, judge. Also present, R. E. Hannay, esq., U. S. attorney; Frank Lee, esq., asst. U. S. atty.; J. S. Williams, U. S. marshal, by R. Herz, deputy, and C. Dart, clerk, by H. H. Kirkpatrick, deputy.

THE UNITED STATES
vs.
S. WRIGHT ET AL. } 586.

This day this cause came on to be heard, upon the motion of the defendant to quash the bill of indictment herein, and, the argument of counsel

therein being heard, because it is the opinion of the court that the law is against the defendant the motion was overruled, to which ruling of the court defendant excepted.

11 In the circuit court of the United States for the eastern district of Texas.

WEDNESDAY, *the* 30 *day of May, A. D.* 1894.

Present: The honorable D. E. Bryant, judge, presiding. The following, among other proceedings, were had, to wit:

THE UNITED STATES, *vs.* STEPHEN WRIGHT & THOMAS WADE, } No. 586. Circuit court. Criminal docket.

This cause coming on this day to be heard, came the United States, by her attorney, and announced ready for trial, and the defendants, Stephen Wright and Thomas Wade, in their own proper persons and by attorneys, appeared and announced ready, and the said defendants, being arraigned, plead not guilty, and suggest their names as Cephas Wright and Thompson Wade; and thereupon came a jury of twelve good and lawful men, to wit: R. S. Brame, P. M. Spears, B. McCarn, J. E. Ellis, N. B. Jones, Tom Humphrey, Geo. C. Miles, R. A. McWhirter, H. C. Fewell, K. A. Pickard, R. W. Emerson, and J. R. Ryan, who, having been duly tried, impaneled and sworn as required by law, and having heard the evidence up to the hour of adjournment and the same not being concluded, the further consideration of this cause was postponed until to-morrow, and the jury was retained in custody of the marshal and cautioned and instructed by the court.

12 THURSDAY, *the* 31 *day of May, A. D.* 1894.

Present: The honorable D. E. Bryant, judge, presiding. The following, among other proceedings, were had, to wit:

THE UNITED STATES *vs.* CEPHAS WRIGHT AND THOMSON WADE. } No. 586. Circuit court. Criminal docket.

This cause coming on this day to be further heard, came the United States, by her attorney, and announced ready for trial, and the defendants, Cephas Wright and Thompson Wade, in their own proper persons and by attorneys, appeared and announced ready; and thereupon came the jury of twelve good and lawful men, to wit: R. S. Brame, P. M. Spears, B. McCarn, J. E. Ellis, N. B. Jones, Tom Humphrey, Geo. C. Miles, R. A. McWhirter, H. C. Fewell, K. A. Pickard, R. W. Emerson, and J. R. Ryan, who, having been duly on yesterday tried, impaneled, and sworn as required by law, and having heard the evidence and on this day the argument of counsel and received the charge of the court, retired to consider of their verdict, and on this day brought into open court their verdict in words and figures as follows, to wit:

"We the jury find the defendants Cephas Wright and Thompson Wade guilty of murder in the Indian country as charged in this indictment.

"R. S. BRAME,
"*Foreman.*

"MAY 31ST, 1894."

13 It is therefore considered by the court that the defendants, Cephas Wright and Thompson Wade, are guilty of murder, as charged in the indictment and as found by the jury, and it is ordered that they be remanded to the custody of the marshal to await the judgment and sentence of the court.

In the U. S. circuit court for the eastern district of Texas, sitting at Paris, Texas.

UNITED STATES
vs.
SEPHUS WRIGHT & THOMPSON WADE. } No. 586.

Comes the defendants, Sephus Wright & Thompson Wade, by their attys., and move the court to set aside the verdict of the jury in the above cause and grant them a new trial, and as grounds for motion assigns the following, to wit:

1st. Because the verdict of the jury is not sustained by the evidence.

2nd. Because the court erred in permitting the witness William Colbert to testify over the objection of the defendants as to his acts as depty. U. S. marshal when it did not appear that the oath of office had ever been administered to him, as required by law; or that he had ever given
14 bond as such and filed and recorded the same, as required by law; or that any oath had ever been administered to him by any officer authorized by law to administer such oath.

3rd. Because the court erred in not sustaining defendants' plea to the jurisdiction of tne court and forcing defendants to trial over their objections without first passing upon said plea.

4th. Because the court erred in overruling defendants' motion to quash the indictment.

5th. Because the court erred in not sustaining defendants' plea to the jurisdiction of the court to try & determine this cause.

6th. Because the court erred in submitting defendants' plea to the jurisdiction of the court to the jury, together with the other issues in the case.

J. J. BRENTS & J. W. FREDERICK,
Attys. for Defts.

(Endorsed:) No. 586. United States *vs.* Cephas Wright & Thompson Wade. Motion for new trial. Filed June 2, 1894. C. Dart, clerk, by H. H. Kirkpatrtek, deputy.

SATURDAY, *June* 2, 1894.

Court met pursuant to adjournment.

* * * * * * *

15 THE UNITED STATES,
vs.
CEPHAS WRIGHT AND THOMPSON WADE. } 586.

This day came on to be heard the motion of the defendants for a new trial herein, and the argument of counsel thereon being heard and the court fully advised in the premises, because it is the opinion of the court that the law is against the defendants the motion is overruled and a new trial denied to the defendants and each of them, to which ruling of the court the defendants in open court excepted.

SATURDAY, *June 16th*, 1894.

Court met pursuant to adjournment.

Present and presiding: Hon. D. E. Bryant, judge. Also present: R. E. Hannay, esq., U. S. atty.; Frank Lee, esq., asst. U. S. atty.; J. S. Williams, U. S. marshal: and C. Dart, clerk, by H. H. Kirkpatrick, deputy.

* * * * * * *

THE UNITED STATES, *vs.* CEPHAS WRIGHT. } 586.

On motion of R. E. Hannay, esq., attorney of the United States for the eastern district of Texas, the above-named defendant, Cepha
16 Wright, was this day brought to the bar of the court in custody of the marshal, and being asked by the court in open court if he had anything to say why the judgment and sentence of the court should not be pronounced upon him in accordance with the verdict of guilty returned by the jury in this cause on the 31st day of May, 1894, and the law in such cases made and provided; and no good cause being shown why the judgment and sentenee of the court should not be pronounced herein: It is therefore considered by the court that the defendent, Cephas Wright, is guilty of murder, as charged in the indictment and as found by the jury, and it is ordered, adjudged, and decreed by the court that the defendant, Cephas Wright, be now remanded to the custody of the marshal of the United States for the eastern district of Texas, and be by him committed to the jail of Lamar County, Texas. and there kept securely confined until Friday, the 28th day of September, A. D. 1894, when, between the hours of 10 o'clock a. m. and 4 o'clock p. m. of said day, he, the said Cephas Wright, shall be taken therefrom, by the marshal aforesaid, to the yard of the said jail, and then and there be, by the marshal aforesaid, hanged by the neck until he, the said Cephas Wright, is dead.

And the clerk of this court is ordered to issue a death warrant, directed to the marshal aforesaid, commanding the due execution of this judgment and sentence according to law.

To which judgment of the court defendant then and there in open court excepted.

17 THE UNITED STATES *v.* THOMPSON WADE. } 586.

On motion of R. E. Hannay. esq., attorney of the United States for the eastern district of Texas, the above-named defendant, Thompson Wade, was this day brought to the bar of the court in custody of the marshal and being asked by the court, in open court, if he had anything to say why the judgment and sentence of the court should not be pronounced upon him in accordance with the verdict of guilty returned by the jury in this cause on the 31st day of May, 1894, and the law in such cases made and provided; and no good cause being shown why the judgment and sentence of the court should not be pronounced herein:

It is, therefore, considered by the court that the defendant, Thompson Wade, is guilty of murder as charged in the indictment and as found by

the jury, and it is ordered, adjudged, and decreed by the court that the defendant, Thompson Wade, be now remanded to the custody of the marshal of the United States for the eastern district of Texas, and be, by him, committed to the jail of Lamar County, Texas, and there kept securely confined until Friday, the 28th day of September, A. D. 1894, when, between the hours of 10 o'clock a. m. and 4 o'clock p. m. of said day, he, the said Thompson Wade, shall be taken therefrom to the yard of the said jail and then and there be, by the marshal aforesaid, hanged by the neck until he, the said Thompson Wade, is dead.

18 And the clerk of this court is ordered to issue a death warrant, directed to the marshal aforesaid, commanding the due execution of this judgment and sentence according to law. To which judgment of the court defendant, in open court, excepted.

In the circuit court of the United States for the eastern district of Texas, sitting at Paris, Texas. April term, A. D. 1894.

THE UNITED STATES
vs. } No. 586.
SEPHUS WRIGHT AND THOMPSON WADE.

Be it remembered that on the 30 day of May, 1894, the same being a day of the regular term of the circuit court of the United States for the eastern district of Texas, came on to be heard the above numbered and entitled cause, and before an announcement of ready, either on the part of the Government or defendants, the defendants interposed their plea to the jurisdiction of the court, which plea is in words as follows:

"Now come the defendants in the above numbered and entitled cause, and for plea herein say that this court should no further prosecute this suit, for the reason that this court has no jurisdiction over the person, life, or liberty of these defendants and no jurisdiction to try and determine this cause, for the reason that said defendants are by blood Chocta'

19 Indians, living and residing in the Chocta' Nation, Indian Territory; and that said offence is said to have been committed in said Chocta' Nation, Indian Territory; and that the deceased, Mike Peter, at the time of the alleged killing, was a Chocta' Indian by blood, living and residing in said Chocta' Nation, Indian Territory. That deceased, at the time of the alleged killing, is not alleged in the ind. to have been Indian agent, or policeman appointed under the laws of the United States, or was he ever such officer, nor was he a United States deputy marshal, or had ever acted as such, nor a posse comitatus, or guard, killed while lawfully engaged in the execution of any of the United States processes. Nor was the said Mike Peter, at the time of the alleged killing, lawfully engaged in any duty imposed upon him as agent, policeman, deputy marshal, posse comitatus, or guard, or was he ever, at any time, a United States officer, created by virtue of the laws of the United States, by reason of which this court could acquire jurisdiction over these defendants.

"Wherefore these defendants say that this court has no jurisdiction to try and determine this cause.

"J. J. BRENTS & J. W. FREDERICK,
"*Attys. for Defts.*

Which said plea the court declined to act upon or sustain, stating same was dependant upon the facts in the case and would be submitted to the jury as other facts to be proven, and controlled by the charge of the court.

To which action of the court the defendants, Sephus Wright and
20 Thompson Wade, each at the time excepted, and asked that their exceptions be entered upon the records in this cause, which was accordingly so done.

Be it remembered that upon the same day and date, the defendants, Sephus Wright and Thompson Wade, filed herein their motion to quash the indictment in this cause, and presented the same to the court for its ruling thereon, which said motion is in words as follows:

"Now come the defendants, Stephen Wright and Thomas Wade, and except to the sufficiency of the indictment filed herein--

"1st. Because said indictment fails to allege that Mike Peter, the deceased, was acting as posse or guard at the time of the alléged killing, or an officer of the United States Government.

"2nd. Because said indictment fails to allege that the offense for which these defendants stand charged was committed within the sole and exclusive jurisdiction of this court.

"Wherefore defendants ask that said indictment be quashed and defendants discharged.

"J. J. BRENTS & J. W. FREDERICK,
"*Defts' Attys.*"

Which said motion was by the court overruled, to which ruling and action of the court the defendants, Sephus Wright and Thompson
21 Wade, each at the time excepted, and asked that their exceptions be entered upon the record in this case, which was accordingly so done.

Be it further remembered that on the trial of this cause the Government produced the following testimony to sustain the issue upon its part, to wit, William Colbert, who, over the objections of the defendants, was permitted to testify as follows:

"BILL COLBERT:

Where do you live?

A. I live at Atoka, Chickasaw Nation, I. T.

Q. What official capacity are you in here?

(We object. There is a way to prove it, and that is the best evidence. If he is a deputy marshal there is a record here by which he is made such, and oral testimony is not admissible.)

By JUDGE. You had better go on and show by whom he was appointed, and show that that party had the proper authority to appoint him; furnish the best evidence you can.

Q. What official capacity are you in?

A. I am a deputy marshal.

Q. (We object, because the marshal's authority has not been shown by the records; they have not shown by the records who was marshal.)

We introduce the bond and record of J. J. Dickerson, showing that he has qualified as marshal of this district, and the different bonds required of him and recorded here—bond of J. J. Dickerson and record showing his appointment.

22 J. J. DICKERSON:

You are the J. J. Dickerson ——

(We are objecting to the oral testimony. They have not accounted for the original; say where it is. There is nothing here showing that it could not be had on this trial).

H. H. KIRKPATRICK:

Did you know but that you had the records here in this office?

A. No, sir; it is at Galveston; the record and certified copy is at Galveston.

(That is our objection; they should be here instead of this verbal evidence).

J. J. DICKERSON:

Q. Have you got your commission as marshal for this district?

A. Yes, sir.

Q. Have you got it with you?

A. No, sir.

Q. You are the J. J. Dickerson that was marshal for the eastern district of Texas for the last four years. Served how long?

A. Up to the 20th day of Jan. 1894.

Q. Now, I will ask you the question, While you were marshal did you appoint Bill Colbert as deputy?

(That is our same objection).

Q. Did you make the appointment of all your deputies in writing?

A. Why, yes.

Q. Made your appointments in writing?

23 A. In writing and printed form; I did not even do that with all of them either.

Q. You gave them a commission?

A. Yes, sir.

Q. Did you require bond of your deputies?

A. Some I did; some I did not.

Q. What did you do with your commissions; file them in the office or give it to the deputies?

A. I gave it to the deputy.

Q. No record required to be kept of the commission that you gave your deputy of his appointment; not recorded in the clerk's office?

A. The commission would not be recorded; the deputy would carry the commission with him to show that he was an officer.

(You admit that he has a commission? Yes, sir. Admit that he was a marshal here up to the time Sheb Williams qualified? Yes, sir; I will do that.)

Cross-examination:

Did you ever appoint Wm. Colbert one of your deputies?

A. Yes, sir.

Q. In writing?

A. I could not tell you: I gave him the commission.

Q. Did you administer the oath to him?

A. The marshal don't administer the oath; the clerk does that.

Q. Was it administered to him?

A. I could not tell you.

24 Q. Does it have to be before you make him a deputy?

A. No, sir; you could not very well administer the oath until you issued the commission.

Q. You simply commissioned them, and they went to the clerk's office and was sworn is—took their oath there?

A. Yes, sir.

Q. Can you say whether any oath was ever administered to this man or not?

A. No, sir.

Q. I understand you can not say; you don't know?

A. I presume it was; I could not say that the oath was administered to any.

Q. He acted as deputy for you for 3 or 4 years?

A. He worked for me quite a while; I don't know exactly how long.

(That is not the question. If this oath was necessary to be administered, it is a question of fact whether it was administered or not.)

By JUDGE. I can not tell until the evidence is all in whether it is proven or not; if it is not, I can exclude it. I can tell when it is all in whether to exclude it or not.

WILL COLBERT:

Were you a deputy marshal under J. J. Dickerson?

A. Yes, sir.

Q. You were appointed by him?

A. Yes, sir.

Q. He gave you a commission?

A. Yes, sir.

25 Q. Who swore you in?

A. That old gray-bearded man.

Q. Captain Brooks, the district clerk here?

A. Yes, sir.

Q. The one with side whiskers?

A. Yes, sir.

Q. He is the one that administered the oath to you?

A. Yes, sir.

Q. You was sworn in as a deputy under Mr. Dickerson?

A. Yes, sir.

Q. He gave you a commission?

A. Yes, sir.

Q. In writing?

A. Yes, sir.

Q. When was that?

A. A little over 3 years ago; I was in pretty near one year before I got a commission.

Q. Where is that commission?

A. I don't know whether I burned it up or not; I burned up a lot of old papers.

Q. Is it lost or destroyed?

A. I haint certain; I think it is.

Q. That was after Mr. Dickerson went out?

A. Yes, sir.

Q. You received another commission under Mr. Williams?

A. Yes, sir.

26 Q. You disposed of that as worthless paper, your old commission?

A. Yes, sir.

Q. You don't know where it is?

A. No, sir.

Q. You burned it or destroyed it?

A. Yes, sir.

Q. You acted as deputy marshal up to the time Mr. Dickerson went out, the 20th of Jan., 1894, under that commission?

A. Yes, sir.

Q. After being sworn in?

A. Yes, sir.

Q. You are a deputy marshal now under Mr. Williams?

A. Yes, sir.

Q. Got a commission under him?

A. Yes, sir.

Q. Now, I will ask you if you know these defendants here, Cephus Wright and Thompson Wade?

A. Yes, sir; I knew them.

Q. (Does the court hold now that he is competent to testify as a deputy marshal? He is proceeding now to testify as to his official acts.)

By JUDGE. He can testify whether he is a deputy marshal or *not*.

(Does the court hold that they have made sufficient proof that he is a deputy marshal?)

Neither one of you understand my ruling.

27 H. H. KIRKPATRICK:

How long have you been clerk of this court?

A. Ever since the court was established, in 1889.

Q. Accustomed to appointing deputy marshals and things of that kind?

A. Yes, sir.

Q. Administering the oath?

A. Yes, sir.

Q. Keep a record of them?

A. None whatever.

Q. Have they ever been kept here?

A. No, sir.

Q. The appointment is placed on file and the commission issued is delivered to the deputy to show his authority, and the other is placed on file but not recorded?

A. Yes, sir.

Q. Did you look to see if you could find Colbert's appointment?

A. Yes, sir; it is not in the place it should be.

Q. You have looked at the place it should be and could not find it?

A. Yes, sir.

By JUDGE. I shall rule that this man is a competent witness; that he is a deputy marshal and can so testify.

(We except to the ruling on the further ground that the witness suggest himself that he was sworn in; that the oath was administered by Captain Brooks, who is clerk of the court, district clerk.)

28 He is district clerk and deputy circuit clerk.

BILL COLBERT:

Now, you say you knew Mike Peters?

A. Yes, sir.

Q. State if he acted as posse man and guard for you at different times; if so, just so state it, explain it to the jury.

A. Yes, sir; he acted as guard for me several times; I don't think I ever brought him down here with me but once. I had a pretty bad horse thief; I had lost a good deal of sleep, and I wanted him to help me.

Q. Was he along when you arrested this party?

A. Yes, sir.

Q. Assisted you in arresting him?

A. Yes, sir.

Q. Assisted you in guarding him to Paris?

A. Yes, sir.

Q. From Atoka down here to Paris?

A. Yes, sir.

Q. What distance is it?

A. 126 miles.

Q. How long was he with you and that party?

A. About 3 days, I believe.

Q. Who was the party?

A. Sam Ward.

Q. What was he charged with?

A. Horse stealing?

Q. You say that he had acted as posse man for you at other times?

A. Yes, sir.

Q. In the Territory?

29 A. Yes, sir.

Q. On different occasions?

A. Yes, sir.

Q. Was he acting for you at the time that he was killed; you notify him to investigate any matter there for you at that time?

A. Yes, sir; he was always working up cases for me, working right along with me all the time.

Q. Looking into cases while you were away?

A. Yes, sir.

Q. He reported to you when you returned?

A. Yes, sir.

Q. You say he come down here with you; who wrote out his guard receipt for him?

A. Jim Lee.

Q. J. B. Lee signed his receipt in that case?

A. Yes, sir.

Q. What date was that, do you remember?

A. About the 21st or 22nd of Dec., 1893.

Q. Here at Paris?

A. Yes, sir.

Q. I understand you to say that he had acted at different times in that capacity as posse man or guard for you when you had prisoners?

A. Yes, sir.

Q. He lived there, close to Atoka?

30 A. Yes, sir.

Q. You are authorized in getting and having posse man, or other guard, as deputy marshal?

A. Yes, sir.

Q. Do you know whether or not these defendants knew that he was your posse man or guard there?

A. I think they did; pretty near everybody in the country knew it.

Q. You know whether they had seen him acting as such?

A. They saw him with me several different times.

Q. You spoke of this man Ward; did you have a warrant for him?

A. Yes, sir.

Q. Charged with horse-stealing?

A. Yes, sir.

Q. In this district for this court?

A. Yes, sir.

Q. Tried and convicted here at this court?

A. Yes, sir.

Q. Where did you arrest these parties?

A. I arrested them about 8 miles north of Coalgate.

Q. Were they both together at the time you arrested them?

A. No, sir.

Q. How far was that from Atoka?

A. I guess it must have been about 23 or 25 miles.

Q. How long was it after Mike Peters was missed when you arrested them?

31 A. It was 8 days to the time they found the body.

Q. They found the body on Sunday?

A. Yes, sir.

Q. You say they found him on Sunday?

A. They found him on Sunday; his mother brought him to town, and I helped get the coffin.

Q. Did you see Austin Williams there?

A. Yes, sir.

Q. He come in with the body?

A. Yes, sir.

Q. The Indian that is here?

A. Yes, sir.

Q. You remember about him bringing a gunstock there?

A. Yes, sir.

Q. You know what become of that?

A. It was there at Com. Grubbs' office; I guess it is there yet.

Q. Delivered to him?

A. Yes, sir.

Q. This Indian brought it in and turned it over to him?

A. Yes, sir.

Q. When you arrested these parties, did you find either one with a broken Winchester at that time?

A. No, sir; I did not.

Q. Did you ever find it there in the possession of either one; was it at the commissioner's court?

(We object to that question.)

Q. Is this the guard receipt here of Mike Peters for assisting you in bringing Sam Ward here, dated the 21st day of Dec., 1893; is that the receipt you was speaking about awhile ago?

32 A. Yes, sir.

Q. Sworn to before Mr. Kirkpatrick?

A. Yes, sir.

Q. This is the guard receipt signed by him, certified to by Mr. Lee, and sworn to before Mr. Kirkpatrick. Was you present at the time Mike signed it?

A. Yes, sir.

Q. Sworn to before G. K. Kirkpatrick?

A. Yes, sir.

Q. That was on the 21st day of Dec., 1893?

A. Yes, sir.

(We introduce the receipt; consider it as evidence.)

Q. You say that it was about 7 or 8 days after the killing had occurred that you arrested these parties?

A. Yes, sir.

Q. Were you before the commissioner's court, summoned there as a witness?

A. Yes, sir.

Q. State if you summoned all the witnesses, notified all the witnesses in this case to go before the commissioner.

A. I summoned what they would let me have.

Q. Was there as many as there are down here?

A. No, sir; they only had 4.

Q. That was all the commissioner would allow pay for?

A. Yes, sir.

Q. You had 4 witnesses to go before the commissioner?

33 A. Yes, sir.

Q. In regard to the other witnesses that are here, you reported the names of the witnesses to me?

A. Yes, sir.

Q. You investigated the case after the parties were arrested there, did you not, and notified me as district attorney?

A. Yes, sir.

Q. Notified me of the witnesses there for the Government?

A. Yes, sir.

Cross-examination:

Q. He posse'd for you, you say, one time?

A. He was posseman for me on several different occasions.

Q. He never got pay but for one trip?

A. He got pay for all he done for me.

Q. Did he sign a receipt for it?

A. He signed a posse man's check; sometimes I would send him in as a witness, and he could not draw fees as a witness and guard to'; sometimes I would send him off after witnesses and have another guard to stay there and guard the man while he went to hunt witnesses.

Q. He never served as posse man or guard in bringing a man here to Paris except the one time, and that is the time he signed the guard receipt?

A. Yes, sir.

Q. Did he have any prisoner, was he acting as guard at the time
34 he is said to have been killed; he was not posse man or guard for you then?

A. Yes, sir; he was working for me all the time—all along.

Q. What was he doing that day?

A. I think he had been down there to Kaney trying to locate some whiskey peddlers.

Q. Is that a posse man's work?

A. Yes, sir; he could locate them better than I could. He would locate them and then I would go down there and catch them.

Q. Then the only difference between a deputy marshal and a posse man is that the posse man locates them and the deputy marshal catches them?

A. Yes, sir.

Q. He is a posse man when he is locating them?

A. He is a posse man as long as he is in my employment.

Q. You never had him to bring but one man down here, signed one set of guard receipts?

A. Yes, sir.

Q. He was not there as a guard or posse man holding anybody on the day in which he is said to have been killed?

A. No, sir; he was not holding anybody that day.

Q. What kind of authority did you give him—just talk to him and tell him to go and help you?

A. Yes, sir.

Q. He never was sworn in as an officer?

A. No, sir; you don't have to swear a posse man in.

35 Redirect:

Q. The deputies all have posse *mans* all the time?

A. Yes, sir.

Q. Working with you any and all times he was investigating some whiskey peddlers, parties introducing liquor in there; that was his business while you were away?

A. Yes, sir.

Q. He reported the cases to you?

A. Yes, sir.

You had him in a good many cases?

A. Yes, sir; I had him in sev*s*eal different cases. A good many cases that he helped me make the arrest that he was a witness in. I could not let him sign the witness roll and guard receipt too.

Q. He worked there at the commissioner's court; this is the only time that he come down to Paris?

A. Yes, sir.

Q. You left him to look after matters there while you would come down here?

A. Yes, sir.

JIM LEE:

Do you know Mike Peters?

A. I had met him once.

Q. You know Bill Colbert?

A. Yes, sir.

Q. What official capacity was Bill in in 1893?

36 (We object; if he is an officer there is a record of it and that is the best evidence.)

By JUDGE. I think that is right.

Q. You know anything about him acting as guard?

(We object.)

By JUDGE. You can prove that he acted as guard and I will instruct the jury to disregard the evidence unless they prove he was acting under him.

Q. Tell what you know about him acting as guard for Bill Colbert.

A. All I know is that Colbert come to me and asked me to make out his return on some papers, and I made out the return for him.

Q. State what you know about Mike Peters being a guard and about making out a guard receipt for him.

A. I filled out a guard receipt for Mike Peters.

Q. Did he sign it?

A. Yes, sir; signed and swore to it before Mr. Kirkpatrick.

Q. You know who was brought down as prisoner?

A. I don't remember.

Q. He was down here with a prisoner?

A. Yes, sir.

Q. What was the custom to do when bringing a prisoner down here?

(We object to that; I don't see what it has to do with this case—any part of it.)

The question is whether this man acted as guard or not.

Q. You signed and made out a guard receipt for this man Mike Peters?

37 A. Yes, sir.

Q. Did he act as posse or guard for you at any time up there?

A. No, sir.

Q. Did you come down here at the time these defendants were arrested?

A. I don't remember whether I did or not.

Q. Cephus Wright and this other defendant?

A. Yes, sir; I brought one of them.

Q. You know whether there was a broken stock or not brought down here at that time, the stock of a Winchester?

A. There was one in the commissioner's office; I don't know whether it was brought here or not.

Q. What become of it?

A. I don't know.

Q. Did you examine it?

A. Yes, sir.

Q. What mark was on it?

(We object to his testimony now until it is connected with the one found.)

By JUDGE. He has the right to introduce the proof in any way he sees proper; unless it is connected I will exclude it. Will you connect that proof?

Yes, sir; if I don't I will quit the case.

Q. Did you notice any blood on the stock?

A. Yes, sir.

Q. Did you notice any name on the stock? If so, what was it?
A. There were 2 or 3 letters on it; I don't know what they were.
38 Q. That was the stock you spoke of; you don't know whether it was brought here or not?
A. I don't think it was ever brought down here; I know I wrapped it up, and my recollection is I gave it to Mr. Grubbs, the commissioner.
Q. Where was the blood at?
A. Most of it was on the but' of the stock; pretty much all over it.
Q. What kind of a stock was it?
A. It looked to be a Winchester stock off from a .38 carbine gun or .44 Winchester.

Cross-examination:

Q. You say there was blood on it?
A. Yes, sir.
Q. Was it fresh blood or dry blood?
A. Dry blood.
Q. Could you tell what sort of blood it was?
A. No, sir.
Q. Whether blood of an animal or human?
A. No, sir.
Q. Do you know these defendants here?
A. I never saw them until they were arrested.
Q. You know whether they are Choctaw Indians or not?
A. They are Choctaws.
Q. Was Mike Peters a Choctaw Indian?
A. Yes, sir.
39 Q. All lived in the Choctaw Nation?
A. Yes, sir.

WILLIE TRUMBLER:

You knew Mike Peters?
A. Yes, sir.
Q. Do you know Cephus Wright?
A. Yes, sir.
Q. Did you know Thompson Wade?
A. Yes, sir.
Q. Did you see them along about the 8th or 9th of January, before Mike Peters was killed up there?
A. Yes, sir.
Q. Where did you see them at; what place?
A. Mike Peters, Cephus Wright, and Thompson Wade come to my house about daylight Tuesday morning.
Q. Where were you living at?
A. I lived close to town.
Q. Now, then, what did they have along; anything?
A. Yes, sir; they had something to drink.
Q. What did they have to drink?
A. Wine.
Q. Did you drink some?
A. Yes, sir.

Q. Now, what, if anything, did you hear them say; anything; did you hear any conversation there; was Mike Peters along then?

A. Yes, sir.

40 Q. Did you hear Cephus Wright and Thompson Wade talking any there?

A. Yes, sir.

Ask him, now, when they come to his house that morning, if he heard any conversation between Cephus Wright and Thompson Wade, and what it was.

A. He said that they was talking something about the marshal.

Q. Ask him to tell what he heard; all he heard.

A. He said that they was speaking about them having that wine, and said that they was afraid that Mike Peters was going to give them away; report them to the marshal.

Q. He was afraid Mike Peters was going to report him. Ask him where Mike Peters was at the time he heard them speaking about it.

A. Mike Peters was standing talking to him.

Q. Ask him how he heard what they were saying; if Mike Peters was there and heard them talking or not; if Mike Peters heard what they said.

A. Yes, sir; he supposes Mike heard them.

Q. Which was the closest to them, him or Mike Peters?

A. He was standing nearest to these other parties.

Q. Ask him where they were when he heard them make that statement.

A. They was at his house.

Q. How far from him?

A. About as far as from here to that table.

41 Q. Ask him which one was talking.

A. Cephus Wright.

Q. Ask him who was there with Cephus Wright.

A. Thompson Wade.

Q. Ask him to tell all he heard them say; everything he heard Cephus Wright and Thompson Wade say there.

A. That was all he heard.

Q. Ask him to tell it over again.

A. They come to his house on Tuesday morning about daylight, these 2 men here and Mike Peters; the 3 come to his house together.

Q. Ask him if they rode or walked there.

A. All 3 of them was riding horseback.

Q. Ask him if he knows what kind of horses they were riding.

A. He said 2 of them was riding bay horses, and 1 of them was riding a dark-brown.

Q. Ask him if he knows what colored horse Mike Peters was riding.

A. He said Mike Peters was riding kind of a blue roan.

Q. Ask him if he knows that was the horse he was riding at the time Mike was missing.

A. He says when they first come by his house they was walking. Mike Peters and Mason Sexton went by going to see Mike Peters' uncle; when they was on their way they come by his house.

Q. Ask him where he got with these 2 defendants.

A. He says he don't know exactly.

42 Q. Did he see them together there at his house; where did he see them together at?

A. They was coming back from the trip that they had made; as they was going back they come to his house that Tuesday morning.

Q. What time in the morning was it when he saw them there?

A. He said they come to his house just about good daylight.

Q. Ask him what become of this other man, Mason Sexton.

A. He don't know where he separated from them at.

Q. Ask him if he was there the last time he saw them that morning; if there was anybody with these 3 parties.

A. Just these 3 come to his house Tuesday morning.

Q. Ask him where it was that he heard Cephus Wright talking to Thompson Wade about Mike Peters reporting them having the wine.

A. He said that they were over on the south side of his house; he said the door was facing the east and that they were on the south side.

Q. Tell him to repeat what it was he heard Cephus Wright say about Mike Peters.

A. He said that what he heard was that Cephus Wright was telling the other fellow there that he was afraid that Mike Peters would give them away, have them arrested, report them to the marshal about having that wine there.

Q. Ask him if Cephus Wright and Thompson Wade knew that Mike Peters was working for any marshal over there.

43 A. He don't know whether they knew that or not.

Q. Did they all leave there together when they left?

A. Yes, sir.

Q. These 2 defendants and Mike Peters?

A. Yes, sir.

Q. Ask him if any of them had any arms of any kind.

A. Cephus Wright had a Winchester.

Q. Ask him where it was; did he have it in his hands or the scabbard.

A. He said that it was in the scabbard on his horse.

Q. Ask him which way they went when they left his house.

A. He said they went west from his house.

Q. Ask him what direction he lived from Atoka.

A. He lived then 3 miles south of Atoka.

Q. Ask him if he knows where Zila Barker lives.

A. No, he don't know.

Q. Ask him if he knew where Brice lived at that time.

A. About 3 and a half miles from there.

Q. Ask him what direction it was from his house to Brices.

A. It was northwest.

Q. Ask him if they said where they were going to when they left his house.

A. He said they said they was going to Brices.

Q. Now ask him when they left did they go in that direction.

A. Yes, sir; they went in the direction of Brices.

44 Ask him if that was in the direction of Atoka from where he lived?

A. Yes, sir.

Q. Ask him if they were drinking at the time; under the influence of liquor when they were at his house.

A. Yes, sir; they was drinking.
Q. Ask him if he drank any of this wine they had.
A. Yes, sir; they gave him some.
Q. What did they have it in?
A. They had it in a jug.
Q. What sized jug?
A. About a 2-gallon jug, he says.
Q. How long did they stay at his house before they left?
A. About one hour.

Cross-examination:

Q. Ask him if Mike Peters did not drink some of that liquor.
A. Yes, sir.
Q. Ask him if this other man, the fourth one that he spoke of, if he did not drink some of it.
A. Yes, sir.
Q. Ask him how far apart they were, Mike Peters and these parties, at the time of this conversation that he heard.
A. He says that they were about as far from him as to that table there.
Q. Ask him how far Mike Peters was from him.
A. He says him and Mike Peters was standing face to face talking.
45 Q. Ask him if his back or face was to these men.
A. He had his back towards these 2 men.
Q. Then Mike Peters had his face towards them?
A. Yes, sir.
Q. Ask him if Mike Peters did not hear all of that conversation.
A. Yes; he says Mike heard it.
Q. Ask him what kind of a horse Mason Sexton was riding.
A. He was not there at this time.
Q. Ask him who told him to come down here and testify.
A. He says Chas. Kilgore gave him the subpœna.
Q. Ask him who was the first party he talked to about these parties being there and having this conversation.
A. He says that he has not talked to anybody.
Q. Ask him how he come to be subpœnaed as a witness here if he had never told it to anybody.
A. He says he don't know how he come to be a witness.
Q. Ask him if he had talked to anybody before Chas. Kilgore gave him that subpœna; if so, who.
A. No; he had not talked with anybody.
Q. Ask him who it was that told him to come down here and testify
A. Chas. Kilgore gave him the subpœna.
Q. Ask him if he told him what he wanted him to swear to.
A. Yes, sir; Chas. told him, he says.
Q. Ask him if he is doing that.
46 A. Yes, sir.

Redirect:

Q. Ask him if he understands what that means—if Chas. Kilgore said anything to him only to tell him that he had to come down here and testify in this case, not as to what he knew about the case.

A. Yes, sir; that is what he told him, that he wanted him to come down here and swear just what he knew about the case. What he knew to be the truth.

Q. Did he tell him that he wanted him to come, or that was what he was subpœnaed for to come?

A. He said that he told him that he was summoned to come and tell the truth about the case.

Q. Ask him if he had told the parties up there, before that, that these defendants were at his house all together that morning—if he had told it around in the neighborhood. If he told any of the parties round about there, since then, that these parties were at his house drinking on that Tuesday morning.

A. No, sir; he has never talked to anybody.

Q. Ask him who lived there at the house with him.

A. No one but him and his wife.

Q. Ask him if his wife saw these parties there.

A. Yes, sir; she saw them.

Q. Ask him if he knows whether or not that she told anybody, if he heard her tell anybody about them being there.

(We object to that.)

47 Q. Ask him if he knows how Bill Colbert knew that he was a witness in the case.

A. He says he don't know how Bill found it out.

Q. Ask him how long he had known Mike Peters.

A. They were children together and schoolmates.

Q. Ask him if he was in between Cephus Wright and Mike Peters when he heard Cephus Wright make this statement to Thompson Wade.

A. Yes, sir; he was in between Mike Peters and these other 2 men.

Q. He told Mr. Brent that Mike Peters heard it; ask him how he knows that Mike Peters heard what Cephus Wright was saying.

A. He said while they were talking he turned and looked right directly the way the men were standing, and from that he supposes he heard the conversation.

Recross:

Q. Ask him if he is certain that he never told anybody about his testimony before he come here.

A. Yes, sir; he is positive about that.

Q. Ask him if he is as positive about that as he is that Kilgore did not tell him what to come down here and swear.

A. He says Kilgore told him when he give him the summon' that he was summoning him to come here and tell what he knew in regard to this case.

48 Be it further remembered, that after all the testimony had closed, both on the part of the Government and the defendants, and argument heard, the defendants requested the court to give and charge the jury as follows, to wit:

First. The court instructs the jury, that as to whether or not Wm. Colbert at the time he appointed deceased as a posseman (if you believe he ever appointed him) was, at the time of said appointment, a duly appointed and qualified deputy marshall, is a material inquiry in this case, and unless you believe, from the evidence, that said Colbert was

appointed by a United States marshall for the eastern district of Texas, and duly commissioned, and the oath of office administered to him by any judge or justice of any State court within the same district, or by any justice of the peace having authority therein, or before any notary public duly appointed in such State, then and in that event you will find the defendants not guilty.

2nd. If the jury should believe from the evidence that the oath of office was administered to Wm. Colbert by Captain Brooks, as clerk, then, and in that event, you are instructed that the oath of office was not administered by any officer authorized to administer oaths to United States deputy marshalls and you will find the defendants not guilty. 3d. Unless
49 the jury should find from the evidence that Wm. Colbert was a United States deputy marshall, duly appointed, and had executed bond as required by law, and that the same had been filed and recorded in the office of the clerk of the district or circuit court for the eastern district of Texas, you will find the defendants not guilty.

4th. The court charges the jury that unless they find from the evidence that Mike Peter was, at the time he was killed, acting as guard or posseman for a legally qualified deputy marshall, they will find the defendants not guilty.

5th. Unless the jury find from the evidence that Wm. Colbert was a duly qualified United States deputy marshall at the time deceased, Mike Peter, was acting as guard or posseman for him, they will find the defendants not guilty.

6th. If a reasonable doubt arises out of the evidence as to whether Wm. Colbert was a legally qualified United States deputy marshall at the time deceased acted for him as guard or posseman, they will find defendants not guilty.

All of which said charges the court refused to give, to which said action of the court in refusing to give said requested charges the defendants, Sephus Wright and Thompson Wade, each at the time excepted and asked that their bill of exceptions be entered upon the records in this cause, which was accordingly done.

50 On the trial of this cause it was admitted, both on the part of the Government and the defendants, that Major Brooks, the party whom Wm. Colbert testified administered the oath to him, was at the time deputy circuit and dist. clerk for the Paris United States court, but he was not a judge or justice of any State court within the eastern district of Texas, nor was he a justice of the peace therein, nor a notary public, appointed in any State, nor was he a commissioner for the circuit court for the eastern district of Texas.

And it was further agreed and admitted that the deceased and both defendants are Chocta' Indians and were living in the Chocta' Nation at the time of the killing.

FRANK LEE,
Asst. U. S. Atty.
J. J. BRENTS & J. W. FREDERICK,
Attys. for Deft.

Approved, June 25, 1894.

DAVID E. BRYANT,
Judge presiding at said trial.

(Endorsed:) No. 586. The United States *vs.* Sephus Wright & Thompson Wade. Bill of exceptions. Filed June 25, 1894. C. Dart, clerk, by Mel Kirkpatrick, deputy.

51 In the circuit court of the United States for the eastern district of Texas, at Paris, Texas, 5th circuit.

THE UNITED STATES
vs.
SEPHUS WRIGHT & THOMPSON WADE. } No. 586.

To the Hon. A. P. McCORMICK,
United States Circuit Judge of Texas, Fifth Judicial Circuit:

Your petitioners, Sephus Wright and Thompson Wade, defendants in the above numbered and styled cause, respectfully represent & allege that in the trial of the above cause, which was tried on May 30, 1894, the defendants were convicted of murder, and were on the 16th day of June sentenced to be hanged.

And defendants represents and show that in the trial, the records, and proceedings of the circuit court of the United States for the eastern district of Texas, at Paris, Texas, in the above styled cause, as well as the trial and the final judgment therein, there are many manifest errors, wherefore your petitioners pray that a writ of error issue for the removal of said cause to the Supreme Court of the United States for review and revision, and that said judgment be reversed.

J. J. BRENTS & J. W. FREDERICK,
Attorneys for Defendants.

(Endorsed:) The United States vs. Sephus Wright & Thompson Wade. Defendants petition for writ of error. Filed July 3, 1894. C. Dart, clerk, by H. H. Kirkpatrick, deputy.

52 THE UNITED STATES OF AMERICA:

The President of the United States of America to the honorable the judge of the circuit court of the United States for the eastern district of Texas, at Paris, Texas, greeting:

In the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court befo'e you, or some of you, between the United States, as plaintiff, & Sephus Wright and Thompson Wade, who are defendants, many manifest errors hath happened, to the great damage of the said defendants, Sephus Wright and Thompson Wade, as by their complaint appears, we being willing that the errors that hath been committed should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do comma'd you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within sixty days in the said Supreme Court of the United States, to be then and there held.

That the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct the errors as according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the day of June, in the year of our Lord one thousand eight hundred and ninety-four.

JAMES HALL MCKING,
Clerk Supreme Court, United States.

Allowed.

A. P. MCCORMICK.

I, C. Dart, clerk of the circuit court of the United States for the eastern district of Texas, hereby certify that I received this writ on the 14th day of July, 1894, and that on this 21st day of July, 1894, I have transmitted to the clerk of the Supreme Court of the United States a copy of the record and proceedings in the within-named cause, duly certified under my hand and seal.

Witness my hand and the seal of said court at my office in the city of Paris the day and date last above named.

[SEAL.] C. DART, *Clerk.*
By MEL. KIRKPATRICK, *Deputy.*

(Indorsed:) The United States vs. Sephus Wright & Thompson Wade. Writ of error. Filed July 14, 1894. C. Dart, clerk, by Mel. Kirkpatrick, deputy.

53 THE UNITED STATES
vs.
SEPHUS WRIGHT & THOMPSON WADE. } No. 586.

The United States of America to Robert E. Hannay, United States district attorney for the eastern district of Texas, greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington, D. C., within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court for the eastern district of Texas (fifth circuit) sitting at Paris, Texas, wherein Sephus Wright and Thompson Wade are plaintiffs in error and the United States is defendant in error, to show cause, if any there be, why the judgment in the said circuit court, and in the said writ of error mentioned, should not be corrected and speedy justice done to the said plaintiffs in error in that behalf.

Witness the honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this, the day of June, in the year of our Lord one thousand eight hundred and ninety-four.

A. P. MCCORMICK,
United States Circuit Judge, fifth Circuit.

JULY 14, 1894.

Attest:

C. DART,
Clerk, U. S. Circuit Court, E. D. Tex.,
By H. H. KIRKPATRICK, *Deputy.*

Service accepted July 14, 1894.

ROBT. E. HANNAY,
U. S. Attorney.

54 (Endorsed:) The United States vs. Sephus Wright & Thompson Wade. Citation in error. Filed July 14, 1894. C. Dart, clerk, by Mel. Kirkpatrick, dep.

In the United States circuit court for the eastern district of Texas, sitting at Paris, Texas.

THE UNITED STATES
vs.
SEPHUS WRIGHT & THOMPSON WADE. } No. 586.

Assignment of errors.

1st. The court erred in not sustaining defendants' plea to the jurisdiction of the court.

2nd. The court erred in overruling defendants' motion to quash the indictment.

3rd. The court erred in permitting the witness, William Colbert, to testify over the objections of defendants as to his acts as deputy United States marshal, when it had not appeared from the evidence that he had ever been legally sworn in as such deputy United States marshal, or that any record of such oath had ever been made or recorded, or that he had ever been legally empowered to act as such deputy marshal.

55 4th. The court erred in not excluding, at request of defendants, the testimony of the witness William Colbert from the consideration of the jury.

5th. The court erred in permitting oral testimony tending to establish the deputy marshalship of Wm. Colbert.

6th. The court erred in refusing to give charges 1, 2, 3, 4, 5, and 6, as requested by the defendants.

7th. The court erred in submitting to the jury the defendants' plea to the jurisdiction of the court, to be considered and determined by them together with the other evidence in the cause.

8th. The court erred in overruling the defendants' motion for a new trial.

J. J. BRENTS & J. W. FREDERICK,
Attorneys for Defend'ts.

(Endorsed:) The United States vs. Sephus Wright & Thompson Wade. No. 586. Assignment of errors. Filed July 3, 1894. C. Dart, clerk, by Mel. Kirkpatrick, dep'ty.

56 I, C. Dart, clerk of the circuit court of the United States for the eastern district of Texas, hereby certify that the foregoing 55 pages of transcript contain and embrace a true copy of the record, bill of exceptions, assignment of errors, and of all proceedings in the case of The United States, plaintiff (defendant in error), against Cephas Wright and Thompson Wade, defendants (plaintiffs in error).

To certify which, witness my hand and the seal of said circuit court of the United States for the eastern district of Texas, at Paris, in said district, this 21st day of July, in the year of our Lord eighteen hundred and ninety-four.

[SEAL.]

C. DART, *Clerk,*
By MEL. KIRKPATRICK, *Deputy.*

57 In the circuit court of the United States for the eastern district of Texas, at Paris.

THE UNITED STATES
vs.
CEPHAS WRIGHT & THOMPSON WADE. } No. 586.

Whereas in the above styled and numbered cause, tried at the April term, 1894, at Paris, and now pending by writ of error in the Supreme Court of the United States, it appears that by inadvertance the charge of the court is not called for in the bill allowed and signed by the presiding judge.

It is hereby stipulated and agreed that said charge be included in the record to be printed by the clerk of the Supreme Court and a certified copy of said charge be forwarded by the clerk of said circuit court at Paris to the clerk of the Supreme Court at Washington, who, by virtue of this authority, will insert the same in the record when printed. And so far as irregularities in the writ of error can be waived by the attorney of the United States for the eastern district of Texas, they are hereby waived.

ROBT. E. HANNAY,
U. S. Atty., E. D. T.
J. J. BRENT,
Atty. for Defts.

I consent that said certified copy of the charge of the court may be filed as part of the record and printed as such by the clerk of the Supreme Court.

LAWRENCE MAXWELL, JR.,
Solicitor-General.

58 THE UNITED STATES
vs.
CEPHUS WRIGHT ET AL.

Gentlemen of the jury, this indictment was filed in this court on the 7th day of April, 1894, charging that one Stephen Wright and one Thompson Wade, in Atoka County, Choctaw Nation, I. T., on the 9th day of January, 1894, with the malice aforethought of each of them, made an assault with a certain gun upon one Mike Peters; that the gun was loaded and charged with gunpowder and leaden bullets, and that assault was made by the said Stephen Wright and the said Thompson Wade with the intention of taking the life of the said Mike Peters; and in consequence of said assault the life of said Mike Peters was so taken. They allege further that Mike Peters had heretofore, to wit, on or about the 23rd day of December, in the year of our Lord 1892, acted in the legal capacity of posse man or guard for a certain deputy marshal for the eastern district of Texas, to wit, Bill Colbert, who was legally empowered to employ and deputize said Mike Peters as posse man and guard; that the said Mike Peters theretofore had at different times acted as posse man and guard, and that being appointed and empowered by said district and said employed officer aforesaid, by virtue of the law of the United States

then and there valid and existing, he, the said Mike Peters, was then and there entitled to the protection of the law of the United States of America.

59 The defendants have been arraigned and entered a plea of not guilty, which places the burden of proof upon the Government to establish their guilt by legal evidence, as charged, to your satisfaction, beyond a reasonable doubt, upon every material question raised in this case.

Murder is the unlawful and intentional taking of human life upon malice, either express or implied, and under circumstances which the law does not justify and which the attending circumstances does not reduce to manslaughter. You know from this definition that the killing must be upon malice, either express or implied, and must be done under circumstances which the law does not justify, and the facts surrounding the transaction does not reduce it to manslaughter.

The terms express and implied malice differ only by reason of the proof in the particular case. When any killing is shown to have been the result of a formed design*ed*, the law books say coolly formed. By that they do not mean that the mind must have been perfectly cool; it simply means that it was not so excited as not to understand fully the consequences of the act about to be committed, no matter what length of time before the homicide is committed. It may be a minute, an hour, day, or year—any length of time before the act is committed. If the mind is in that state of cool reflection to form a design, and in pursuance of such formed design the life of the party is taken, the killing is on express malice. Illustrations of express malice ordinarily used is such as lying in wait for the victim

60 which they intend to kill, and in pursuance of such formed design kill their victim. Where death is by poison which has been prepared beforehand and administered to their intended victim, simply showing a formed design; a determined mind to carry out the conception which has been formed; but those are only illustrations of the rule. Whenever the attending circumstances of any case shows that the killing was the result of a formed design, coolly formed, and was not justifiable or reducible to manslaughter, in that state of case it is a killing upon express malice.

Implied malice simply means where a homicide has been committed by the party charged, and the circumstances surrounding the homicide shows it was not justifiable nor reducible to manslaughter, yet the evidence fails to show why the party did the act; in that state of case the law implies malice from the nature of the act committed, to wit, the taking of human life without justifiable cause. A killing upon express or implied malice under the Federal law is murder; there are no degrees of murder.

I can not think of any facts in this case that would justify a charge upon manslaughter; there is no evidence before me upon a question of self-defense. In this case the Government contends that Mike Peters was murdered; they further contend that the defendants murdered him. The defense is that they are not guilty; that the evidence is not legally sufficient to convict them, and the evidence in regard to Cephus Wright was an alibi; that he was at another and different place when the homicide occurred, therefore could not have been one of the parties committing the act.

61 As both parties are charged with the offense it becomes necessary to instruct you on the law in regard to principals. When the party is present at the time the offense is committed and knew the unlawful intent of the party that actually commits the deed, and are present for the purpose of aiding in the commission of the act or encouraging by words the party that commits the deed, in the commission of the deed they are as guilty as the one that actually commits the deed. Bare presence alone is not sufficient; the presence must not only exist, but the knowledge that the other party contemplated—intended to commit—the act must also exist. He must be present for the purpose of either aiding by act or encourageing by words the party in the commission of the offense. If the party is present, knowing the unlawful act is going to be committed by his companion, and is present for the purpose of aiding or encourageing him in the commission of the act, he is as guilty as the party that actually commits the act. If he is only accidentically present, simply present knowing that an unlawful act was going to be committed and not present for the purpose of aiding or encourageing in the act, he would not be a principal.

It is undisputed that the defendants are Indians, and that Mike Peters was an Indian, and this court would be without jurisdiction to try this case only by reason of the special matters alleged in the indictment, that Mike Peters had been a guard and posseman for a deputy marshal who deputized him to act and who had the authorty to deputize him.

62 The statute upon which this exception is placed was passed in 1888, and reads as follows:

"That any Indian hereafter committing against the person of any Indian agent or policeman appointed under the laws of the U. S., or against any Indian United States deputy marshal or guard, while lawfully engaged in the execution of any of the United States process, or lawfully engaged in any other duty imposed upon such agent, policeman, deputy marshal, or guard by the laws of the United States, any of the following crimes, namely, murder, manslaughter or assault with intent to murder, assault or assault and battery, or who shall in any manner obstruct by threats or violence any person who is engaged in the service of the United States in the discharge of any of his duties as agent, policeman, or other officer aforesaid, within the Indian Territory, or who shall hereafter commit either of the crimes aforesaid, in said Indian Territory, against any person who, at the time of the commission of said crime or at any time previous thereto, belonged to either of the classes of officials hereinbefore named, shall be subject to the laws of the United States relating to such crimes, and shall be tried by the district court of the United States exercising criminal jurisdiction where such offense was committed and shall be subject to the same penalties as all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases."

63 This indictment alleges that Mike Peters was acting as guard and posseman for one Wm. Colbert, that Colbert was then a deputy marshal and had authority to deputize said Mike Peters to act as such guard and posseman. A guard is a person who is summoned by a marshal or deputy marshal or an Indian policeman, or any party having the power to arrest and retain criminals and to place them in custody; a guard is a

person summoned for the purpose *or* helping and assisting an officer in the detention and transportation of the party that is arrested. A posseman, as I understand it, is a person who is simply assisting a deputy for the purpose of apprehending criminals, and after they are apprehended assisting him in guarding them in order to enforce the law.

This case is a case of circumstantial evidence. By that is meant that no eyewitness saw the murder committed. The rule of law is that the circumstances detailed in the testimony upon which the Government seeks conviction, the circumstances must be consistent with each other, they must be consistent with the defendants' guilt, and they must be inconsistent with any other reasonable conclusion. By that is meant that the evidence taken as a whole satisfies your mind that the defendants and no other person committed the offense charged—that is what the rule means; that the circumstances surrounding the homicide must be of such a satisfactory nature as to satisfy your minds beyond a reasonable doubt that the party charged with the offense is the party that committed it and no other person did commit it.

64 Therefore, you are instructed that if you believe from the testimony in this case that the defendants, at any time previous to the 7th day of April, 1894, in Atoka County, Choctaw Nation, Indian Territory, did take the life of Mike Peters by the means charged and upon malice either expressed or implied, and you further believe that Mike Peters had theretofore been either a guard or a posseman acting under *under* Colbert, and you further believe that Colbert was a deputy marshal of this court in that event, and you so believe beyond a reasonable doubt, you will find the defendants guilty as charged in this indictment. If you have a reasonable doubt in regard to their guilt, it is your duty to resolve it in their favor and acquit them.

If the jury believe from the evidence that Wm. Colbert, prior to Mike Peters' death, had been appointed a deputy marshal, by J. J. Dickerson, U. S. marshal of the eastern dist. of Texas, & said Colbert was in fact acting as such deputy, & had summoned said Mike Peters as guard or posse, & said Peters had so acted, in that event said Colbert would at least be a de facto deputy, & this court would have jurisdiction to try this cause.

You are the sole and exclusive judges of the weight of the evidence and the credibility of the witnesses; it is purely a question of conviction based upon the evidence that has been offered before you. You understand the important nature of this case. It is one of the most important duties that men in the capacity of jurymen can be called upon to perform; the lives of two parties is at issue, is at stake. It is your duty to take this testi-

65 mony and consider it well from every standpoint; don't act hastily, but deliberately; if the evidence satisfies your mind beyond a reasonable doubt, under the principles of law that I have given you in charge, that they are guilty, it is your duty to convict them. If you have a reasonable doubt, based upon the testimony, it is your duty to acquit them. Take this case and consider it well. You have a right to convict both or one of them. You have a right to acquit one or both of them. You have a right to convict one and acquit one. The defendant, Cephus Wright, would not plead to the name of Stephen Wright, but plead to the name of Cephus Wright.

If you find them guilty, the form of your verdict will be, "We the jury find the defendants, Cephus Wright and Thompson Wade, guilty of murder in the Indian country, as charged in this indictment," date it, and sign it by your foreman. If you find them not guilty, the form of your verdict will be, "We the jury find the defendants, Cephus Wright and Thompson Wade, not guilty of murder in the Indian country," date it, and sign it by your foreman. If you find one guilty and the other not guilty, then specify in your verdict your finding.

(Endorsed:) 586. U. States vs. Sephus Wright and Thompson Wade. Charge of the court. Filed, May 31, 1894. C. Dart, clerk, by H. H. Kirkpatrick, deputy.

66 In the circuit court of the United States for the eastern district of Texas, at Paris.

I, C. Dart, clerk of the circuit court of the United States, for the eastern district of Texas, in the fifth circuit, do hereby certify the foregoing to be a true and correct copy of the charge of the court in cause No. 586 on the criminal docket of said court, entitled The United States vs. Cephas Wright and Thompson Wade, as the same now appears on file in my office at Paris, Texas.

To certify which, witness my hand and the seal of said court, at Paris, in said district, this the 26 day of September, A. D. 1894.

C. DART,
Clerk U. S. Circuit Court, E. D. T.,
By H. H. KIRKPATRICK,
Deputy.

(Indorsed:) No. 586. United States circuit court, eastern district of Texas. United States vs. Cephas Wright & Thompson Wade. Copy of charge of the court.

67 (Indorsed:) Case No. 15650. Supreme Court U. S. October term, 1894. Term No. 766. Sephus Wright et al., plffs. in err., vs. The United States. Stipulation and addition to record. Filed Oct. 22, 1894.

68 (Indorsed on cover:) Supreme Court U. S. Clerk's office. Received Jul. 26, 1894. Case No. 15650. Term No. 766. Sephus Wright and Thompson Wade, plaintiffs in error, vs. The United States. E. Texas, C. C. U. S. Filed July 26th, 1894.

Office Supreme Court, U. S.
FILED.
DEC 6 1894
JAMES H. McKENNEY,
CLERK.

158-232

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

SEPHUS WRIGHT AND THOMPSON WADE, plaintiffs in error,
v.
THE UNITED STATES.
No. 766.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

SEPHUS WRIGHT AND THOMPSON WADE, plaintiffs in error, v. THE UNITED STATES. } No. 766.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR DEFENDANT IN ERROR.

Plaintiffs in error were indicted for the murder of one Mike Peter, on January 9, 1894, in Atoka County, in the Choctaw Nation. They were tried before Judge Bryant and a jury, and convicted May 31, 1894.

STATEMENT OF FACTS.

It was admitted by the district attorney that the prisoners were both Choctaw Indians, as was the deceased, and that all were in the Choctaw Nation at the time of the

killing (p. 23). The jurisdiction of the court was based upon the Statute of June 9, 1888, ch. 382, which is as follows:

> That any Indian hereafter committing against the person of * * * any Indian United States deputy marshal, posse comitatus, or guard * * * any of the following crimes, namely, murder, manslaughter, * * * or who shall hereafter commit either of the crimes aforesaid in said Indian Territory against any person who at the time of the commission of said crime, *or at any time previous thereto*, belonged to either of the classes of officials hereinbefore named, shall be subject to the laws of the United States relating to such crimes, and shall be tried by the district court of the United States exercising criminal jurisdiction where such offense was committed, and shall be subject to the same penalties as all other persons charged with the commission of said crimes respectively; and the said courts are hereby given jurisdiction in all such cases.

Atoka, as will be seen by reference to recent maps, is within this district, as bounded by the act of March 1, 1889, ch. 333, §§ 17, 18.

The circumstances of the killing are not material, nor are they fully set forth in the record. The questions raised are jurisdictional, namely, whether the court had jurisdiction of the subject-matter.

It was not claimed by the district attorney that Mike Peter, the murdered Indian, was acting in any official capacity at the time of his death. It was claimed that a few days beforehand he had been acting as guard in the

employ of William Colbert, a deputy United States marshal, and that he had also acted in the capacity of posse comitatus.

The definitions of these terms—guard and posse comitatus or "posse man"—are given by Judge Bryant as follows:

> A guard is a person who is summoned by a marshal or deputy marshal, or an Indian policeman, or any party having the power to arrest and retain criminals and to place them in custody; a guard is a person summoned for the purpose of helping and assisting an officer in the detention and transportation of the party that is arrested. A posse man, as I understand it, is a person who is simply assisting a deputy for the purpose of apprehending criminals, and after they are apprehended assisting him in guarding them in order to enforce the law (pp. 29–30).

Plaintiffs in error rely on alleged irregularities in the appointment of this William Colbert and alleged insufficiency of proof of his official capacity as deputy marshal. The official record of his appointment could not be found, and it appeared that he took the oath of office before the clerk of the district court, who is not shown to have had authority to administer such oath.

ARGUMENT.

The assignments of error are set forth at page 26 of the record.

I. *Plea to the jurisdiction.*—A plea was interposed at pages 3–4. Defendants except to the action of the court at page 9 in submitting the facts pleaded to the jury. It may be remarked that the plea itself was insufficient, as

not negativing all the requirements of the statute; nor was any plea necessary but the general plea of not guilty (1 Bishop, Criminal Procedure, § 736). The questions thereby intended to be raised come up on the rulings at the trial.

II. *Motion to quash.*—Error is assigned to the overruling of defendants' motion to quash the indictment. The first ground of the motion is plainly insufficient, as may be seen by referring to the statute. The second ground is purely formal and therefore disposed of by § 1025 of the Revised Statutes. Furthermore, a motion to quash is addressed to the discretion of the court, and error is therefore not assignable to its denial. (*United States* v. *Rosenburgh*, 7 Wall., 580; *United States* v. *Hamilton*, 109 U. S., 63.)

III, IV, V. *Competency of Deputy Marshal Colbert.*—These assignments of error bring up in different ways, the claim that William Colbert was not a deputy marshal (and therefore that Mike Peter was not a guard within the protection of the statute), because Colbert's appointment was either insufficiently proved or accompanied by some irregularity. It is claimed that he never was legally sworn in, that no record was made of his oath, and that he was never legally empowered to act.

If his appointment were really irregular, his oath taken before the wrong party, and his authority insufficiently proved, nevertheless he was a *de facto* officer, and that is enough. (*State* v. *Carroll*, 38 Conn., 449, quoted and approved in *Norton* v. *Shelby County*, 118 U. S., 425, 445–6; *Cocke* v. *Halsey*, 16 Pet., 71; *Hussey* v. *Smith*, 99 U. S., 20; *In re Manning*, 139 U. S., 504; *Ball* v.

United States, 140 U. S., 118, 129.) It would be very strange if such irregularities should jeopardize the lives of his Indian employees, who should thus lose the protection of civilized courts.

Moreover, it is not necessary to prove the appointment of a deputy marshal when the case is tried in his own district. The court takes judicial notice of its own officers. It is, indeed, held in *Slaughter* v. *Barnes* (3 A. K. Marsh., 412), and *Ward* v. *Henry* (19 Wis., 76), that judicial notice will not be taken of a deputy marshal of another court, and Greenleaf lays it down as a general rule applicable to deputies; but this cannot apply reasonably to the court whose deputy the officer is and in which his appointment has been filed. (*Norrell* v. *McHenry*, 1 Mich., 227.)

There is no requirement that such an officer shall receive a commission. The commission is not the appointment, even when a commission is called for by the law (*Marbury* v. *Madison*, 1 Cranch., 137, 159.) The so-called commission which this deputy carried around with him during his term, and lost or destroyed at the end of his term, was evidently a mere written authority, for the purpose of being exhibited to persons with whom he would have dealings.

There is no statute requiring that the appointment should be in writing, and such evidence is not considered necessary. (*Potter* v. *Luther*, 3 Johns., 431; 1 Greenleaf Ev., § 92, and cas. cit.) It appears that the appointment in this case was in writing and put on file, but that on being sought in the place where it should be at the time of the trial it could not be found. This is suffi-

cient to let in other evidence of the appointment, even if oral evidence of such an appointment were not sufficient (*United States* v. *Reyburn*, 6 Pet., 352, 366; *Minor* v. *Tillotson*, 7 Pet., 99), especially when the document is of no further use, the term of office having expired, so that great care in preserving it would not be expected. (*Bouldin* v. *Massie*, 7 Wheat., 122, 155.)

VI. *Refusals to charge.*—The first three requests to charge relate to matters previously considered. The third request calls for the execution of a bond by Colbert, but no bond is required by law from a deputy marshal.

The fourth request asks the court to charge that the defendants are not guilty unless Mike Peter was acting as guard or posse man for a legally qualified deputy marshal *at the time he was killed*. Laying aside the question of legal qualification for the deputy marshal, the statute distinctly gives jurisdiction not only when the murdered man is acting in an official capacity at the time of the murder, but also when he had acted in such capacity at any previous time.

The intent of the statute is clear. In order to obtain the services of Indians to assist a U. S. marshal it is necessary that they be brought under the protection of the Federal courts. It would not be at all sufficient if this protection should last only during their actual employment. The moment that an Indian goes into the service of the U. S. Government and begins arresting his fellow-tribesmen he becomes to a certain degree declassed. He can thereafter not hope for the same protection from the native authorities in case of an outrage done to him by one of the men whom he has arrested or kept prisoner.

The statute, therefore, very wisely puts him under Federal protection for the rest of his life.

The fifth and sixth requests bring up again defendants' main objection, that Colbert must be shown to have been a *de jure* as well as a *de facto* deputy marshal.

VII. This assignment of error is a repetition of the first assignment.

VIII. The denial of a motion for a new trial is not assignable error. (*Holder* v. *United States*, 150 U. S., 91, 92; *Blitz* v. *United States*, 153 U. S., 308, 312.)

It may be remarked that no objection was taken at the trial to the fact that this prosecution was conducted in the circuit court instead of in the district court. The statute gives express jurisdiction to the district court, but the circuit court obtained concurrent jurisdiction by virtue of the act of August 13, 1888, ch. 866, § 1. The proviso at the end of § 30 of the Oklahoma act of May 2, 1890, ch. 182, does not affect this case. It does not confer exclusive jurisdiction on the Indian tribunals over prosecutions of which they had not jurisdiction previously. It provides merely that they "shall *retain* exclusive jurisdiction," etc., showing that it was intended as a saving, and not in any sense a repealing, clause.

It is respectfully submitted that the judgment should be affirmed.

EDWARD B. WHITNEY,
Assistant Attorney-General.